IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SANDRA G. KENYON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 5:16-cv-01306-OLG**
	§	
U.S. BANK NATIONAL ASSOC., AS TRUSTEE FOR THE HOLDERS OF THE BANC OF AMERICA FUNDING CORPORATION 2008-FT1 TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2008-FT1.	§	
	§	
Defendant.	§	

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE'S, ORIGINAL COUNTERCLAIM

U.S. Bank National Association, as Trustee (**U.S. Bank**), files this original counterclaim against Sandra G. Kenyon (**Kenyon**). In support thereof, U.S. Bank shows the following:

I. PARTIES

1. U.S. Bank is the defendant and counter-plaintiff.

2. Kenyon is the plaintiff and counter-defendant. Kenyon is already before this court and may be served through her counsel of record, Trey Wilson and Christopher L. Sabala, RL Wilson Law Firm, 16607 Blanco Road, Suite 501, San Antonio, Texas 78232.

II. JURISDICTION & VENUE

3. This court has diversity jurisdiction over this matter pursuant to 28 USC §§ 1332(a) and 1441 because there is complete diversity between the real parties in interest and the amount in controversy exceeds $75,000. This court has personal jurisdiction over Kenyon because she is a citizen of the State of Texas.

4. Venue is proper in this district because the conduct giving rise to U.S. Bank's counterclaim took place, and the property the subject of this suit is located, within this district.

III. STATEMENT OF RELEVANT FACTS

5. Kenyon obtained a home equity loan from Bank of America, N.A. (**BANA**) in the amount of $250,000 as evidenced by the promissory note (**note**) dated March 1, 2006.[1] In connection with the note, Kenyon executed a Texas Lien Contract and Deed of Trust (**deed of trust**) dated March 1, 2006 encumbering the real property located at 2149 Ahern Creek Road, Spring Branch, Texas 78070 (**property**).[2] The deed of trust secures the obligations under the note by granting a first lien security interest against the property.[3] The security instrument was ultimately assigned to U.S. Bank.[4]

6. Of the $250,000 in loan proceeds, $194,199.26 was used to pay off two prior existing mortgages, thereby extinguishing the previous liens against the property, and $55,800.74 was paid to Kenyon.

7. Kenyon defaulted on the note in 2009 by failing to make installment payments as required.

8. Kenyon also failed to pay taxes assessed against the property. Kenyon was primarily responsible for the payment of the taxes, and her failure to do so created a lien against the property, superior to the deed of trust.[5] U.S. Bank and/or its predecessors-in-interest and/or the agent of U.S. Bank and/or its predecessors-in-interest, advanced funds to satisfy Kenyon's tax obligations in order to obtain the release of tax liens against the property.

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[1] Ex. 1, Promissory Note.
[2] Ex. 2, Texas Lien Contract and Deed of Trust.
[3] *See id.*
[4] Ex. 3, Assignment of Note and Deed of Trust.
[5] *See* Ex. 2, Texas Lien Contract and Deed of Trust.

9. On May 3, 2013, U.S. Bank obtained a default home equity foreclosure order pursuant to Texas Rule of Civil Procedure 736,[6] and on August 6, 2013, the property was sold at foreclosure sale to U.S. Bank.[7]

10. Kenyon filed this lawsuit on November 11, 2016.[8] Kenyon alleges she did not sign the note or deed of trust and requests the court enter an order the deed of trust and substitute trustee's deed evidencing U.S. Bank's foreclosure of the deed of trust are void.[9] Kenyon also brings a claim against U.S. Bank for trespass to try title, claiming she has a superior right of ownership and possession of the property.[10]

11. U.S. Bank has performed all conditions precedent to recovery, or such conditions have been waived or are excused.

IV. CAUSES OF ACTION

12. U.S. Bank re-asserts and re-alleges the facts set forth in paragraphs 1 through 11, above, as if fully set forth herein, and respectfully shows the court the following:

A. Declaratory Judgment – Equitable Lien/Equitable Subrogation.

13. To the extent the Court declares the deed of trust and/or substitute trustee's deed invalid, U.S. Bank seeks a declaration it is entitled to a valid and enforceable equitable first lien on the property, pursuant to equitable and/or contractual subrogation, in the amount of $194,199.26 – the amount paid to obtain the releases of liens against the property – plus amounts paid to obtain releases of tax liens, and interest accruing on such amounts at the rate of 6% per annum from the date of each disbursement. When one party pays the debt of another, the paying party is subrogated to the rights of the creditor paid. "Equitable subrogation is the legal fiction

[6] Ex. 4, Default Home Equity Foreclosure Order.
[7] Ex. 5, Substitute Trustee's Deed.
[8] Plaintiff's Original Petition with Attached Discovery Requests (**Pet.**), docket 1-2.
[9] *See* Pet. at ¶ 4.12-4.15, 5.6.
[10] *See* Pet. at ¶ 4.14, 5.4-5.5.

whereby an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another." *See Day Cruises Mar., LLC v. Christus Spohn Health Sys.*, 267 S.W.3d 42, 61 (Tex. App.—Corpus Christi 2008, pet. denied) (internal quotations omitted). Texas courts have repeatedly accepted and applied the doctrine of equitable subrogation and have been in the forefront of applying it. *Diversified Mortg. Inv'rs v. Lloyd Blalock Gen. Contractor, Inc.*, 576 S.W.2d 794, 807 (Tex. 1978).

14. The doctrine of subrogation is always given liberal interpretation and is broad enough to include every instance in which one person, not acting voluntarily, has paid a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the primary obligor. *McBroome Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32, 36 (Tex. Civ. App.—Dallas 1974, writ ref'd, n.r.e.). Equitable subrogation is instituted to guard the investment of a lender who pays another's debt by granting that lender the rights and security held by the previous creditor. *Vogel v. Veneman*, 276 F.3d 729, 735 (5th Cir. 2002) (also holding a valid deed of trust executed by both the borrower and lender establishes contractual subrogation); *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 337-38 (Tex. 1980). The doctrine of equitable subrogation grants U.S. Bank rights and security held by the liens it, or its predecessors-in-interest and/or their agents, discharged through payment of obligations to which Kenyon was obligated.

B. Quantum Meruit/Unjust Enrichment.

15. To the extent the Court declares the deed of trust and/or substitute trustee's deed invalid, U.S. Bank seeks from Kenyon $55,800.74 – the amount of the loan proceeds paid to Kenyon – under the doctrines of quantum meruit and unjust enrichment.

16. U.S. Bank's predecessor-in-interest, BANA, rendered money in the amount of $55,800.74 to Kenyon when the loan originated.

17. Kenyon accepted these funds and used and enjoyed them.

18. In rendering the funds, U.S. Bank and/or its predecessors-in-interest, was expecting to be paid by Kenyon.

19. Kenyon has been unjustly enriched by retaining the funds rendered by U.S. Bank's predecessor-in-interest, BANA.

C. Money Had and Received.

20. To the extent the Court declares the deed of trust and/or substitute trustee's deed invalid, U.S. Bank seeks $55,800.74 from Kenyon, which is the amount of the loan proceeds paid to Kenyon under the doctrine of money had and received.

21. Kenyon holds money, which in equity and good conscience belongs to U.S. Bank. A cause of action for money had and received is not premised on wrongdoing, but "simply examines whether the defendant has received money which rightfully belongs to another." *Tornado Bus Co. v. Bus & Coach Am. Corp.*, 3:14-CV-3231-M, 2015 WL 5164731, at *6 (N.D. Tex. Sept. 2, 2015) (citing to *H.E.B., L.L.C. v. Ardinger*, 369 S.W.3d 496, 507 (Tex. App.—Fort Worth 2012, no pet.)).

V. ATTORNEY'S FEES

22. U.S. Bank also seeks to recover from Kenyon the reasonable and necessary costs and expenses, including attorneys' fees, incurred in bringing these claim.

VI. PRAYER

WHEREFORE, premises considered, U.S. Bank respectfully requests this court enter a judgment it be awarded any and all relief prayed for herein and to which it may show itself justly entitled, including an award of its attorneys' fees and costs of court.

Date: May 18, 2017

Respectfully submitted,

*_/s/ Walter McInnis_*
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ATTORNEYS FOR DEFENDANT U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, a true and correct copy of the foregoing was served as follows:

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